

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

Stephen J. Iwaniszek,

Plaintiff,

V.

## Pride Transport, Inc.,

**Defendant.**

Case No. 2:17-cv-02918-JCM-BNW

## ORDER

Pride Transport, Inc.,  
Defendant.

Before the Court is plaintiff Stephen J. Iwaniszek’s application for leave to proceed in forma pauperis (“IFP”). ECF No. 21. Iwaniszek submitted the affidavit required by 28 U.S.C. § 1915(a) showing an inability to prepay fees or costs or give security for them. Therefore, Iwaniszek’s request to proceed IFP will be granted.

Further, as required by 28 U.S.C. § 1915(e)(2), the Court screened plaintiff's operative complaint below. Iwaniszek failed to allege a plausible claim for relief under any of the statutes cited or theories raised in his complaint. Therefore, his complaint will be dismissed without prejudice but with leave to amend. Plaintiff must closely review this screening order and file an amended complaint, if he wishes to proceed with this action, in accordance with the Court's instructions by March 10, 2021.

## I. Procedural history

Iwaniszek initiated this matter with an application to proceed IFP and an accompanying complaint on November 21, 2017. ECF No. 1. The magistrate judge then-assigned to this matter recommended to the district judge that he deny Iwaniszek’s application because his income and assets were sufficient to pre-pay the costs and fees for this civil action. ECF No. 6 at 2–3. Since that time, Iwaniszek filed an updated application to proceed IFP, ECF No. 21, which the Court granted above.

1           On February 13, 2019, the Court screened Iwaniszek’s original complaint, dismissed it  
 2 without prejudice for failure to state a claim, and allowed Iwaniszek an opportunity to file an  
 3 amended complaint. ECF No. 4. Iwaniszek filed his amended complaint at ECF No. 11.

4           **II. Iwaniszek’s allegations and claims for relief**

5           Iwaniszek was previously employed by defendant Pride Transport, Inc. *Id.* at 2. He  
 6 alleges that he sustained an injury on September 21, 2016, while on the job. *Id.* Specifically, he  
 7 claims that he strained his “muscle of fascia and tendons of the lower back.” *Id.*

8           Following this injury, a physician ordered that Iwaniszek be permitted to return to work  
 9 but that he be restricted from lifting over 10 pounds and driving a company vehicle. *Id.* at 3, 10.<sup>1</sup>  
 10 Iwaniszek claims that Pride Transport failed to accommodate this order between September 18,  
 11 2016, through December 20, 2016. *Id.* at 3. Iwaniszek further claims that Pride Transport  
 12 attempted to have him sign “various leave of work contracts.” *Id.*

13           Iwaniszek filed a workers’ compensation claim on September 21, 2016. *Id.* at 24. His  
 14 claim was denied on November 3, 2016. *Id.* Iwaniszek alleges that the filing of this claim  
 15 resulted in the termination of his employment by Pride Transport on or around December 1, 2016.  
 16 *Id.* at 3.

17           Following this termination, Iwaniszek submitted a claim for unemployment benefits to the  
 18 State of Utah Unemployment Division. *Id.* at 6. Iwaniszek alleges that Pride Transport lied to the  
 19 unemployment division when it informed the unemployment division that Iwaniszek had resigned  
 20 from his employment. *Id.* In truth, Iwaniszek alleges, Pride Transport had terminated Iwaniszek’s  
 21 employment. *Id.* This alleged lie resulted in the unemployment division denying Iwaniszek’s  
 22 unemployment claim. *Id.* at 3, 6.

23           Based on these allegations, Iwaniszek asserts claims against Pride Transport for violations  
 24 of the Americans with Disabilities Act, violation of the Rehabilitation Act, violations of Title VII,

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 26           <sup>1</sup> The Court draws this allegation from an exhibit that Iwaniszek attached to his complaint. ECF  
 27 No. 11 at 10. In determining whether a plaintiff has stated a plausible claim for relief, the Court may  
 28 consider documents attached to the complaint. *Dunning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

1 violation of the Genetic Information Nondiscrimination Act, and for breach of trust, breach of  
 2 contract, and breach of the implied covenant of good faith and fair dealing.

3 **III. Screening standard**

4 Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint  
 5 under 28 U.S.C. § 1915(e)(2). In screening the complaint, a court must identify cognizable  
 6 claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may  
 7 be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.  
 8 § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard  
 9 for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*,  
 10 668 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain  
 11 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”  
 12 See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints  
 13 and may only dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts  
 14 in support of his claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908  
 15 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

16 In considering whether the complaint is sufficient to state a claim, all allegations of  
 17 material fact are taken as true and construed in the light most favorable to the plaintiff. *Wyler*  
*Summit P'ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).  
 18 Although the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff  
 19 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
 20 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*  
 21 Unless it is clear the complaint’s deficiencies could not be cured through amendment, a pro se  
 22 plaintiff should be given leave to amend the complaint with notice regarding the complaint’s  
 23 deficiencies. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

24 **IV. Analysis**

25 **A. Title VII**

26 Title VII “is central to the federal policy of prohibiting wrongful discrimination in the  
 27 Nation’s workplaces.” *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 342 (2013).

1 It forbids two categories of employer conduct. The first category is status-based discrimination,  
 2 which prohibits an employer from discriminating on the basis of race, color, religion, sex, or  
 3 national origin. *Id.* (citing 42 U.S.C. § 2000e-2(a)). The second category is “employer  
 4 retaliation,” which prohibits an employer from retaliating against an employee for having  
 5 opposed, complained of, or sought remedies for unlawful workplace discrimination forbidden by  
 6 Title VII. *Id.* (citing 42 U.S.C. § 2000e-3(a)).

7       **1. Title VII discrimination**

8       To state a prima facie case of status-based discrimination under Title VII, plaintiff must  
 9 allege that: (1) plaintiff belongs to a protected class; (2) plaintiff was qualified for the position;  
 10 (3) plaintiff was subject to an adverse employment action; and (4) similarly situated individuals  
 11 outside of plaintiff’s protected class were treated more favorably. *McDonnell Douglas Corp. v.*  
 12 *Green*, 411 U.S. 792, 802 (1973).<sup>2</sup>

13       Here, plaintiff has not alleged a plausible status-based discrimination claim under Title  
 14 VII. For the first element, plaintiff does not allege that he belongs to a protected class. Indeed,  
 15 the complaint lacks any reference to plaintiff’s race, color, religion, sex, or national origin.  
 16 Further, plaintiff does not allege that he was qualified for his job position, which means his  
 17 allegations fail to meet the second element, too. Finally, regarding the third element, plaintiff  
 18 failed to allege that similarly situated individuals outside his protected class were treated more  
 19 favorably. Therefore, plaintiff’s claim will be dismissed without prejudice but with leave to  
 20 amend.<sup>3</sup>

21       **2. Title VII retaliation**

22       For a retaliation claim under Title VII, plaintiff must allege: (1) that plaintiff engaged in a  
 23 protected activity; (2) that plaintiff suffered a materially adverse action that would deter a  
 24 reasonable employee from making a charge of employment discrimination; and (3) a but-for

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25       <sup>2</sup> A plaintiff need not establish a prima facie case of discrimination in the complaint, since the  
 26 prima facie case is an evidentiary standard, not a pleading requirement. *Coates v. Washoe Cnty. Sch. Dist.*,  
 27 2020 WL 7186746, at \*2 (D. Nev. Dec. 4, 2020). But “the elements of each alleged cause of action help  
 to determine whether plaintiff has set forth a plausible claim for relief.” *Id.* (quotation omitted).

28       <sup>3</sup> The Court identified these same deficiencies in its prior screening order. ECF No. 4.

1 causal link between the protected activity and the adverse action. *See Porter v. Calif. Dept. of*  
 2 *Corrections*, 419 F.3d 885, 894 (9th Cir. 2005); *Nassar*, 570 U.S. at 359–60. An employee  
 3 engages in protected activity if the employee: (1) opposes any practice made unlawful by Title  
 4 VII; or (2) made a charge, testified, assisted, or participated in any manner in an investigation,  
 5 proceeding, or hearing under Title VII. *Brophy v. Day & Zimmerman Hawthorne Corp.*, 799 F.  
 6 Supp. 2d 1185, 1199 (D. Nev. 2011) (citing 42 U.S.C. § 2000E-3(a)).

7 Here, plaintiff has not alleged a plausible claim for Title VII retaliation. Plaintiff has not  
 8 pointed to any oppositional activity that he engaged in. Nor has plaintiff alleged that he  
 9 participated in an investigation, proceeding, or hearing under Title VII. Therefore, plaintiff has  
 10 not alleged that he engaged in a protected activity, and his claim fails at the first element.

11 Even if plaintiff had sufficiently alleged a protected activity, plaintiff's claim would still  
 12 fail at the third element because he failed to allege but-for causation. *Albro v. Modly*, 2020 WL  
 13 1937056, at \*12 (E.D. Cal. Apr. 22, 2020) (dismissing a Title VII retaliation claim for failing to  
 14 allege “the heightened but-for causation standard”). Thus, plaintiff has not alleged a plausible  
 15 Title VII retaliation claim. Accordingly, plaintiff's claim will be dismissed without prejudice but  
 16 with leave to amend.

## 17           **B. Americans with Disabilities Act**

18           The Americans with Disabilities Act (“ADA”) prohibits discrimination “against a  
 19 qualified individual on the basis of disability in regard to job application procedures, the hiring,  
 20 advancement, or discharge of employees, employee compensation, job training, and other terms,  
 21 conditions, and privileges of employment.” 42 U.S.C. § 12112(a). The ADA applies to private  
 22 employers. *Puckett v. Park Place Ent. Corp.*, 332 F. Supp. 2d 1349, 1352 (D. Nev. 2004).

23           Here, it appears that plaintiff alleges an ADA claim under three theories: failure to  
 24 accommodate, discrimination, and retaliation.<sup>4</sup>

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 26           <sup>4</sup> The necessary elements of an ADA claim can differ based on context, “in part because a prima  
 27 facie case is an evidentiary standard, not a pleading requirement.” *U.S. Equal Employment Opportunity  
 Comm'n v. MCJ, Inc.*, 306 F. Supp. 3d 1204, 1221 (D. Haw. 2018) (quotations and citation omitted). Thus,  
 28 while an ADA plaintiff may not be strictly bound by the elements of a prima facie case, those elements are  
 a useful tool in assessing whether a complaint meets Rule 8’s pleading standard. *Id.*

1           **1. Failure to accommodate under the ADA**

2           For a plausible failure-to-accommodate claim under the ADA, plaintiff must allege that:

3           (1) plaintiff is disabled within the meaning of the ADA; (2) plaintiff is a qualified individual with  
 4           a disability; (3) plaintiff requested an accommodation; (4) the employer knew of the requested  
 5           accommodation; and (5) the employer failed to reasonably accommodate plaintiff's disability.

6           *Pham v. Las Vegas Superstore, Inc.*, 2015 WL 1906345, at \*2 (D. Nev. Mar. 12, 2015) (citing  
 7           *Sanders v. Arneson*, 91 F.3d 1351, 1353 (9th Cir. 1996)). “Generally, an employee must initially  
 8           request the accommodation, but if the employer knows the employee is disabled and [is] having  
 9           workplace problems as a result, it may not be required the employee make the initial request.” *Id.*  
 10          (citing *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001)).

11          The ADA defines a “disability” as: “(A) a physical or mental impairment that  
 12           substantially limits one or more of the major life activities . . . ; (B) a record of such an  
 13           impairment; or (C) being regarded as having such an impairment.” *Puckett*, 332 F. Supp. 2d at  
 14          1352–53 (citing 42 U.S.C. § 12102(2)). Lifting is a major life activity. *Id.* at 1353.

15          Here, plaintiff fails to state a viable failure-to-accommodate claim under the ADA.  
 16          Regarding the first element, plaintiff’s physician restricted him from lifting more than 10 pounds.  
 17          ECF No. 11 at 10. A lifting restriction of “more than 25 pounds on a continuous basis” is—as a  
 18           matter of law—not substantially limiting. *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540  
 19           (9th Cir. 1997) (per curiam) (citations omitted).<sup>5</sup> But whether a lifting restriction of more than 10  
 20           pounds constitutes a “substantial limitation” remains a question of fact inappropriate for  
 21           resolution at the screening stage. *See Dewitz v. Teleguam Holdings, LLC*, 2014 WL 1410156, at  
 22          \*8 (D. Guam Apr. 10, 2014). Therefore, under *Dewitz*, plaintiff has sufficiently alleged the first  
 23           element of his ADA claim.

24          However, plaintiff’s claim fails at the second element because plaintiff did not allege that  
 25           he was a qualified individual with a disability.<sup>6</sup> A qualified individual is “an individual who, with

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27          <sup>5</sup> Superseded on other grounds by statute, ADA Amendment Act of 2008, Publ. L. No. 110–325.

28          <sup>6</sup> The court identified this same deficiency in its prior screening order. ECF No. 4 at 6.

or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” *Lambdin v. Marriott Resorts Hospitality Corp.*, 2015 WL 263569, at \*3 (D. Haw. Jan. 21, 2015) (citing 42 U.S.C. § 12111(8)). Here, plaintiff did not allege that he was capable of performing the essential functions of his position with or without a reasonable accommodation. To be sure, plaintiff “need not include any magical invocation of the ‘prima facie case’ language” to meet Rule 8’s pleading standard, but he “cannot leave his opponent and the court with no information at all about whether or how he falls under the ADA.” *Id.* The absence of an allegation about such a basic matter weighs in favor of dismissal. *Id.* But plaintiff will be given a final opportunity to meet the pleading standard for his failure-to-accommodate claim.<sup>7</sup>

Conversely, plaintiff has sufficiently alleged the third and fourth elements of his claim. Following plaintiff's injury, plaintiff's physician restricted plaintiff from lifting anything over 10 pounds and from driving the company vehicle. ECF No. 11 at 10. Based on internal communications among Pride Transport's employees, Pride Transport was aware of these restrictions. ECF No. 11 at 29.<sup>8</sup> After broadly construing plaintiff's complaint, this is sufficient at the pleading stage for the third and fourth elements because Pride Transport was aware of the disability and the restrictions attendant to that disability.

Further, for the fifth element, plaintiff alleges that Pride Transport failed to provide modified duty in the workplace. ECF No. 11 at 4. Although a bit sparse, the Court broadly construes plaintiff's allegation to mean that Pride Transport refused to allow plaintiff to continue working within the restrictions ordered by his physician. This is sufficient for the fifth element at this preliminary stage.

In sum, plaintiff's failure-to-accommodate claim fails at the second element because he did not allege that he was qualified for his position. This claim will be dismissed without prejudice but with leave to amend.

<sup>7</sup> The court identified this deficiency in its prior screening order. ECF No. 4 at 6.

<sup>8</sup> In determining whether a plaintiff has stated a plausible claim for relief, the Court may consider documents attached to the complaint. *Dunning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

1           **2. General discrimination under the ADA**

2           To state a colorable claim for disability discrimination under the ADA, plaintiff must  
3           allege that plaintiff: (1) is a disabled person under the ADA; (2) is a qualified individual with a  
4           disability; and (3) suffered an adverse employment action because of plaintiff's disability. *Ravel v.*  
5           *Hewlett-Packard Enter., Inc.*, 228 F. Supp. 3d 1086, 1092 (E.D. Cal. 2017).

6           Plaintiff has not alleged a plausible ADA discrimination claim. For the first element, the  
7           Court has already found that plaintiff has sufficiently alleged he is a disabled person under the  
8           ADA. However, for the second element, the Court has likewise already found that plaintiff failed  
9           to allege he was a qualified individual under the ADA because he did not allege that he was  
10          capable of performing the essential functions of his position with or without a reasonable  
11          accommodation. Thus, plaintiff's claim fails at the second element.

12          The third element—whether plaintiff suffered an adverse employment action—presents a  
13          close call. An adverse employment action “materially affects the compensation, terms, conditions,  
14          or privileges of . . . employment.” *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008)  
15          (brackets omitted). Under Count II of his complaint, plaintiff alleges that Pride Transport violated  
16          the ADA because it “attempted” to persuade him “to sign various leave of work contracts and  
17          requests, thus, frustrating the pending workers’ compensation claims.” ECF No. 11 at 5. It is  
18          unclear to the Court whether plaintiff alleges that the persuasion attempts impacted plaintiff’s  
19          workers’ compensation claim or, conversely, whether plaintiff alleges that the persuasion attempts  
20          **would have** materially impacted his workers’ compensation claim had the attempts been  
21          successful. Broadly construed, it appears plaintiff alleges the former rather than the latter. Thus,  
22          the Court will not dismiss the claim on this basis.

23          Still, plaintiff’s claim fails at the second element, so this claim will also be dismissed  
24          without prejudice but with leave to amend.

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1                   **3. Retaliation**

2                  ADA retaliation claims are analyzed under the same framework as Title VII retaliation  
 3 claims. *Purcell v. Am. Legion*, 44 F. Supp. 3d 1051, 1056 (E.D. Wash. 2014). Therefore, to state  
 4 a plausible ADA retaliation claim, plaintiff must allege: (1) involvement in a protected activity;  
 5 (2) an adverse employment action; and (3) a but-for causal link between the two. *Arnold v. Pfizer, Inc.*, 970 F. Supp. 2d 1106, 1140 (D. Ore. 2013) (citing *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000)); *Gallagher v. San Diego Unified Port Dist.*, 14 F. Supp. 3d 1380, 1386 (S.D. Cal. 2014).

9                  Here, plaintiff does not state a plausible claim for ADA retaliation. For the first element,  
 10 plaintiff alleges that he was fired for filing a workers' compensation claim. ECF No. 11 at 5. The  
 11 Ninth Circuit has not authoritatively decided whether the filing of a workers' compensation claim  
 12 is a protected activity under the ADA. *Williams v. City of Las Vegas*, 359 Fed. Appx. 753, 754 (9th Cir. 2009) (unpublished). A few district courts in our circuit have answered that question in  
 13 the affirmative. *See, e.g., Rider v. Lincoln Cnty. Sch. Dist.*, 2015 WL 853071, at \*5 (D. Ore. Feb.  
 14 24, 2015); *but see Larson v. Liberty Mutual Fire Ins. Co.*, 2011 WL 13196103, at \*1 (D. Haw.  
 15 Mar. 4, 2011) ("asserting workers' compensation rights is not necessarily the same as asserting  
 16 rights under the ADA"); *Kendall v. Donahoe*, 913 F. Supp. 2d 186, 193 (W.D. Pa. 2012)  
 17 ("[n]early every court that has confronted the issue has held that the filing of a workers'  
 18 compensation claim in itself is not protected activity under the ADA").

20                Here, this matter has not advanced beyond the screening stage and the Court therefore  
 21 lacks any briefing from the parties on this point of law. Therefore, the Court will assume without  
 22 deciding that the filing of a workers' compensation claim is sufficient to meet the first element of  
 23 plaintiff's ADA retaliation claim.

24                Still, plaintiff's claim fails at the third element. Plaintiff alleges in his complaint that  
 25 defendant wrongfully terminated him for exercising his right to file a workers' compensation  
 26 claim. Termination is an adverse employment action under the ADA, so plaintiff's claim meets  
 27 the second element. However, plaintiff failed to allege that the adverse employment action  
 28 "would not have occurred in the absence of—that is, but for—" his protected activity. *See Albro*

1       *v. Modly*, 2020 WL 1937056, at \*12 (E.D. Cal. Apr. 22, 2020) (dismissing a Title VII retaliation  
 2 claim for failing to allege “the heightened but-for causation standard”); *Barnett v. U.S. Air, Inc.*,  
 3 228 F.3d 1105, 1121 (9th Cir. 2000) (en banc) (finding that the Title VII retaliation framework  
 4 applies to ADA retaliation claims), *vacated on other grounds*, 535 U.S. 391 (2002).

5           In sum, even assuming that the filing of a workers’ compensation claim is a protected  
 6 activity under the ADA, plaintiff’s ADA retaliation claim still fails because he did not allege but-  
 7 for causation. Thus, the Court will dismiss this claim without prejudice but with leave to amend.

8           **C. Genetic Information Nondiscrimination Act (the “GINA”)**

9           The purpose of GINA is to prevent employers from making a “predictive assessment  
 10 concerning an individual’s propensity to get an inheritable genetic disease or disorder based on  
 11 the occurrence of an inheritable disease or disorder in [a] family member.” *Poore v. Peterbilt of*  
 12 *Bristol, L.L.C.*, 852 F. Supp. 2d 727, 730 (W.D. Va. 2012). To that end, GINA prohibits an  
 13 employer from discriminating or taking adverse action against an employee because of genetic  
 14 information. 42 U.S.C. § 2000ff-1(a). The Act likewise prohibits an employer from requesting,  
 15 requiring, or purchasing genetic information concerning an employee. § 2000ff-1(b). “Genetic  
 16 information” means information about (1) an individual’s genetic test, (2) genetic tests of an  
 17 individual’s family members, or (3) the manifestation of a disease or disorder in an individual’s  
 18 family members. § 2000ff(4).

19           Here, plaintiff alleges no facts showing that he was discriminated against based on his or  
 20 his family’s genetic tests or diseases that run in his family. He does not explain how any  
 21 discriminatory conduct is related to his genetic information. There is no factual basis for this  
 22 claim, and it will be dismissed without prejudice but with leave to amend.<sup>9</sup>

23           **D. Rehabilitation Act**

24           Section 504 of the Rehabilitation Act (“RA”) prohibits discrimination on the basis of  
 25 disability “under any program or activity receiving Federal financial assistance.” *McKeon v.*  
 26 *Central Valley Community Sports Foundation*, 2019 WL 7282047, at \*4 (E.D. Cal. Dec. 27,

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 28           <sup>9</sup> The Court identified this same deficiency, too, in its prior screening order. ECF No. 4 at 6.

1 2019) (citing 19 U.S.C. § 794(a)). Section 504 has been authoritatively construed to reach  
 2 employment discrimination. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632 (1984).

3 To establish a claim under § 504 of the RA, a plaintiff must allege that plaintiff: (1) is a  
 4 handicapped person under the Act; (2) is otherwise qualified for the position sought or held; (3)  
 5 was excluded from the position solely by reason of plaintiff's handicap; and (4) is seeking a  
 6 position that exists as part of a program or activity receiving federal financial assistance. *See*  
 7 *Janet G. v. Hawaii, Dept. of Ed.*, 410 F. Supp. 2d 958, 964–65 (D. Haw. 2005) (citing *Smith v.*  
 8 *Barton*, 914 F.2d 1330, 1338–39 (9th Cir. 1990)). Under the RA's implementing regulations, a  
 9 “handicapped person” is “any person who (i) has a physical or mental impairment which  
 10 substantially limits one or more major life activities; (ii) has a record of such impairment, or (iii)  
 11 is regarded as having such an impairment.” 34 C.F.R. § 104.3(j)(1). “Major life activities”  
 12 means “functions such as caring for one's self, performing manual tasks, walking, seeing,  
 13 hearing, speaking, breathing, learning, and working.” § 104.3(j)(2)(ii). And an “otherwise  
 14 qualified individual” is an individual with a disability “who, with or without reasonable  
 15 accommodation, can perform the essential functions of [the] position.” *Aki v. Univ. of Calif.*  
 16 *Lawrence Berkeley Nat'l Laboratory*, 74 F. Supp. 3d 1163, 1175 (N.D. Cal. 2014) (citing  
 17 *Mustafa v. Clark Cnty. Sch. Dist.*, 157 F.3d 1169, 1175 (9th Cir. 1998)).

18 Here, plaintiff has not alleged a plausible claim under the RA. Plaintiff meets the first  
 19 element because lifting more than 10 pounds and driving a truck appear to be the sort of “manual  
 20 task” covered by the RA. *Evans v. Runyon*, 965 F. Supp. 1388, 1389 (C.D. Cal. 1997) (finding  
 21 that plaintiff was handicapped based on evidence that she injured her left foot and “could not . . .  
 22 drive”).

23 However, plaintiff's claim fails at the second element because he did not allege that he  
 24 was otherwise qualified for the position he held. Again, plaintiff cannot leave his opponent or the  
 25 Court in the dark about whether or how he falls under the RA, and his claim can be dismissed on  
 26 this basis alone.

27 Further, plaintiff's claim fails at the fourth element, too. “Section 504 . . . prohibits  
 28 discrimination only by a program or activity receiving Federal financial assistance.” *Consolidated*

1      *Rail Corp. v. Darrone*, 465 U.S. 624, 635–36 (1984). Plaintiff has not alleged that Pride  
 2 Transport receives or received federal financial assistance. On this additional basis, plaintiff's  
 3 RA claim will be dismissed without prejudice but with leave to amend.

4      **E. Breach of trust**

5      Nevada has adopted the Uniform Trusts Act. NRS 163.010. As a result, Nevada imposes  
 6 civil liability upon a trustee for breaching a trust. NRS 163.115(3)(c).

7      Here, plaintiff has not stated a plausible claim for breach of trust. To begin, the Trusts  
 8 Act applies to express trusts only. NRS 163.020(3). But plaintiff does not allege the existence of  
 9 a trust. In fact, plaintiff's allegations do not speak to how the supposed trust between plaintiff  
 10 and defendant was formed, what the trustee's duties were, and how the supposed trustee violated  
 11 those duties. In short, plaintiff's claim is far too threadbare to support a claim for breach of trust,  
 12 and this claim will be dismissed without prejudice but with leave to amend.<sup>10</sup>

13     **F. Breach of contract**

14     To state a claim for breach of contract, plaintiff must allege: (1) the existence of a valid  
 15 contract, (2) breach, and (3) damages as a result of the breach. *Tarr v. Narconon Fresh Start*, 72  
 16 F. Supp. 3d 1138, 1141 (D. Nev. 2014). A contract is valid if there has been “an offer and  
 17 acceptance, meeting of the minds, and consideration.” *Id.* (citing *May v. Anderson*, 119 P.3d  
 18 1254, 1257 (Nev. 2005)).

19     Here, plaintiff fails to state a plausible claim for breach of contract. Plaintiff's complaint  
 20 mentions a breach of contract in the introduction to his complaint, but then never again.  
 21 Plaintiff's allegations do not speak to the existence of a valid contract, what the terms of the  
 22 contact were, how defendant breached the contract, or how he was damaged as a result of the  
 23 breach. Therefore, plaintiff's claim will be dismissed without prejudice but with leave to amend.

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 25     <sup>10</sup> To the extent plaintiff meant to plead the existence of an implied trust, “[i]mplied trusts”—such  
 26 as a constructing or resulting trust—“are equitable remedies,” they are not causes of action. *Bemis v.*  
*Estate of Bemis*, 967 P.2d 437, 741 (Nev. 1998). A remedy can be requested in connection with a  
 27 substantive claim, but a remedy cannot be a standalone claim. *Jensen v. Quality Loan Servc. Corp.*, 702 F.  
 28 Supp. 2d 1183, 1201 (E.D. Cal. 2010). Therefore, plaintiff's claim for breach of trust is dismissed on this  
 basis, too.

#### **G. Breach of the covenant of good faith and fair dealing**

To establish a claim for breach of the implied covenant of good faith and fair dealing, plaintiff must allege: (1) the existence of a contract between the parties; (2) that defendant breached its duty of good faith and fair dealing by acting in a manner unfaithful to the purpose of the contract; and (3) that plaintiff's justified expectations under the contract were denied. *Rosas v. GEICO Casualty Co.*, 365 F. Supp. 3d 1123, 1127 (D. Nev. 2019) (citing *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995)).

Here, plaintiff fails to state a plausible claim for breach of the implied covenant of good faith and fair dealing. For the first element, the Court has already found that plaintiff failed to allege the existence of a contract. It follows, then, that the Court is without sufficient allegations to determine whether defendant acted in a manner unfaithful to the purpose of the contract. Finally, plaintiff did not allege what his justified expectations were under the contract and how those expectations were denied. Therefore, plaintiff's claim will be dismissed without prejudice but with leave to amend.

## **V. Instructions for filing an amended complaint**

Plaintiff is instructed that if he intends to file an amended complaint, an amended complaint supersedes the original complaint and, thus, the amended complaint must be complete by itself. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (holding that “[t]he fact that a party was named in the original complaint is irrelevant; an amended pleading supersedes the original”); *see also Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding that for claims dismissed with prejudice, a plaintiff is not required to reallege such claims in a subsequent amended complaint to preserve them for appeal). Plaintiff’s amended complaint must contain all claims, defendants, and factual allegations that Plaintiff wishes to pursue in this lawsuit.

## VI. Conclusion

IT IS THEREFORE ORDERED that plaintiff's Application to Proceed in forma pauperis (ECF No. 21) is GRANTED.

1 IT IS FURTHER ORDERED that all of the claims in plaintiff's complaint (ECF No. 11)  
2 are dismissed without prejudice but with leave to amend.

3 IT IS FURTHER ORDERED that by **March 10, 2021**, plaintiff must file an amended  
4 complaint consistent with the instructions in this order. Failure to meet this deadline will result in  
5 a recommendation to the district judge that this case be dismissed without prejudice.

6 DATED: February 17, 2021.

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8 BRENDAG WEKSLER  
9 UNITED STATES MAGISTRATE JUDGE  
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